

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

INLAND PAPERBOARD AND PACKAGING,
INC. f/k/a INLAND CONTAINER CORP.,

Complainant,

v.

COMMONWEALTH EDISON COMPANY,

Respondent.

No. 00-0385

Complaint as to municipal taxes and
franchise fees improperly charged to the
complainant in Leyden Township, Illinois.

COMMONWEALTH EDISON COMPANY'S MOTION TO DISMISS
INLAND PAPERBOARD AND PACKAGING, INC.'S AMENDED COMPLAINT

Commonwealth Edison Company ("ComEd"), pursuant to Section 200.190 of the Illinois Commerce Commission's (the "Commission") Rules of Practice, respectfully moves to dismiss the Amended Complaint ("Complaint" or "Formal Complaint") filed against ComEd by Complainant, Inland Paperboard and Packaging, Inc. ("Complainant" or "Inland"). ComEd moves to dismiss all claims made in the Complaint for recovery of municipal taxes collected by ComEd prior to September 15, 1996 on the ground that such claims are barred by the applicable statute of limitations.

BACKGROUND

Inland's complaint relates to certain charges associated with electric service ComEd provided to the Complainant from December 5, 1989 through October 30, 1997. Complainant alleges that ComEd wrongfully collected Village of Franklin Park

("Village") municipal taxes and franchise costs from Inland during this time period.
(Complaint, attached as Ex. A.)

Certain municipal taxes are imposed on sellers of electricity, such as ComEd, who are authorized to then pass those taxes on to customers. See 220 ILCS 5/9-221; ComEd Rider 23. The same is true of certain franchise agreement costs. See ComEd Rider 16. Here, ComEd sold electricity to Inland. Inland alleges that ComEd billed and collected from Inland municipal taxes and franchise costs for the Village. Complainant further alleges that these charges were improper because the property receiving electric service was located not in the Village, but in unincorporated Leyden Township. Complainant claims that ComEd improperly charged it for (1) Village municipal utility taxes, during the period of December 5, 1989 through October 30, 1997; and (2) Village franchise costs, during the period of April 4, 1995 through October 30, 1997. (List of Billing Periods, attached to Amended Formal Complaint.)

On September 15, 1999, Inland first presented an administrative claim regarding ComEd's alleged failure to provide tax credits. (Informal Complaint, attached as Ex. B). The claim was in the format of an informal complaint to Commission staff, pursuant to Ill. Admin. Code tit. 83 § 200.160. Inland did not file a Formal Complaint until May 26, 2000. On June 23, Inland amended the Complaint to correct a typographical error.

Even assuming that the factual statements in Inland's complaint are true for the purposes of this motion only, the Complaint is untimely. Inland seeks to recover alleged municipal tax overcharges paid from December 5, 1989 through October 30, 1997 and alleged franchise cost overcharges paid from April 4, 1995 through October 30, 1997, but the applicable statute of limitation prohibits recovery for municipal taxes collected by ComEd prior to September 15, 1996. Any complaint by Inland

must, accordingly, be limited to recovery of municipal taxes, if any, incorrectly collected on or after September 15, 1996, and franchise costs.¹

DISCUSSION

A. The Complaint Is Barred By 735 ILCS 5/13-224

The relevant statute of limitation provision of the Illinois Code of Civil Procedure, 735 ILCS 5/13-224, which applies to actions for recovery of taxes passed through to a customer by a utility like ComEd, bars the Complainant from recovering an taxes collected prior to September 15, 1996. Section 13-224 states that:

. . . [I]n any action against a taxpayer to recover charges imposed pursuant to Sections 9-201 or 9-202 of The Public Utilities Act that were illegally or unconstitutionally collected, the prevailing party shall not be entitled to recover an amount exceeding such taxes or charges paid, plus interest, where applicable, during a period beginning 3 years prior to the date of filing an administrative claim as authorized by statute or ordinance or court complaint, whichever occurs earlier.

735 ILCS 5/13-224 (attached as Ex. C).

A statute of limitation, like § 13-224, is a legislative determination that certain types of claims must be brought within a prescribed time period. The Commission has determined that it does not have the authority to waive or modify statutory limitation periods. See Kumaran v. The Peoples Gas Light and Coke Co., 1994 Ill. PUC LEXIS 409, at *2 (addressing 220 ILCS 5/9-252).

The plain language of § 13-224 demonstrates that Inland's complaint falls well within its scope. According to the quoted portion, § 13-224 applies to claims alleging that a taxpayer illegally or unconstitutionally has collected charges imposed pursuant

¹ ComEd does not assert that Inland's franchise cost claim is barred by the applicable statute of limitations. Nor does it argue that municipal tax claims for post-September 1996 taxes are barred.

to §§ 9-201 or 9-202 of the Public Utilities Act (the "Act").² Section 9-201 of the Act requires public utilities to give notice of rate and charge changes by, among other things, filing rate schedules and supplements with the Commission. 220 ILCS 5/9-201.³

Here, Inland alleges that ComEd, a taxpayer under the terms of the Public Utilities Revenue Act, has collected Village public utility tax charges, which were imposed under its Rider 23 upon customers pursuant to the procedures outlined in § 9-201. As required by § 9-201, ComEd gave notice to the Commission of municipal utility tax charges it was imposing by filing Supplemental Schedules in Rider 23 detailing those charges. See Ill. C. C. No. 4, 3rd Revised Sheet No. 85.01, eff. August 1, 1998.

The complaint further specifically alleges that ComEd collected those tax charges from Inland, although Inland's facility was not within the corporate limits of the Village. Village Ordinance No. 8990 G 12 (1989) (attached as Ex. D) assesses the tax only on gross receipts relating to customers within the Village's corporate limits.

² The reference in § 13-224 to "Sections 9-201 or 9-202 of The Public Utilities Act" (emphasis added) may be a typographical error that should be read to refer to Sections 9-221 and 9-222 of the Act. In 1988, § 13-224 was revised to correct certain obsolete references. The text which now refers to §§ 9-201 and 9-202 previously referred to "subsections (a) or (b) of Section 36 of 'An Act concerning public utilities', approved June 29, 1921, as amended." P.A. 85-1209, Art. III, § 3-69, eff. Aug. 30, 1988. While §§ 9-201, 9-202, 9-221, and 9-222 were all formerly combined in Section 36 of the former Public Utilities Act, subsections (a) and (b) contained only the text of current §§ 9-221 and 9-222—not §§ 9-201 and 9-202. See Ill. Rev. Stat. 1983, ch. 111 2/3, § 36.

Sections 9-221 and 9-222 of the Act provide that a public utility may pass on to its customers municipal and state utility taxes, respectively. 220 ILCS 5/9-221, 9-222. A reference to those provisions, instead of the more general §§ 9-201 and 9-202, makes more sense in the context of § 13-224, a statute of limitation relating to recovery of utility taxes. Nonetheless, § 13-224 applies to this action regardless of whether it properly refers to §§ 9-201 and 9-202 because ComEd passes utility tax charges on to its customers pursuant to both the procedures outlined in § 9-201 and its authority to do so under §§ 9-221 and 9-222.

³ Section 9-201 also authorizes, but does not require, the Commission to hold hearings to determine the propriety of proposed rates. 220 ILCS 5/9-201. Section 9-202 grants the Commission power to fix temporary rate increases in cases of lengthy § 9-201 hearings. 220 ILCS 5/9-202.

Accordingly, the complaint claims that ComEd collected Village municipal taxes from Inland illegally, in contravention of the Village Ordinance, making § 13-224 applicable.

Inland seeks to recover taxes from December 5, 1989 through October 30, 1997. However, § 13-224 bars Complainant from recovering tax overcharges paid prior to the three-year period preceding the filing of either an administrative claim or court complaint, whichever occurs earlier. 735 ILCS 5/13-224. Here, Inland filed its administrative claim on September 15, 1999. Consequently, § 13-224 limits Inland's recovery of alleged illegally collected municipal taxes to the three-year period of September 15, 1996 to September 15, 1999. As a matter of law, the Complaint, to the extent it seeks to recover any municipal taxes collected prior to September 15, 1996, is time-barred.

**B. 735 ILCS 5/13-224 Applies To This Action
To The Exclusion Of 220 ILCS 5/9-252 And 9-252.1**

Inland may assert that the Complaint is governed by the general limitation periods found in the Public Utilities Act, 220 ILCS 5/9-252 and 9-252.1. However, 735 ILCS 5/13-224 more specifically relates to this action and therefore applies, to the exclusion of Sections 9-252 and 9-252.1. Under Illinois law, where multiple "statutes of limitation arguably apply to the same cause of action, the one which more specifically relates to the action must be applied." Haddad's of Illinois v. Credit Union 1 Credit Union, 286 Ill. App. 3d 1069, 1072, 678 N.E.2d 322, 324 (4th Dist. 1997) (attached as Ex. E).

Section 9-252 allows the Commission to order a public utility to make reparations to a complainant when the Commission finds that the utility has "charged an excessive or unjustly discriminatory amount for its product, commodity or service." Thus, it sweeps in the wide range of cases in which a complainant alleges that a

utility is imposing excessive or discriminatory charges. Section 9-252.1 applies to complaints alleging that a utility has either charged more than its published rate or incorrectly measured the amount of service provided. Its language applies only to allegations of excessive charges, generally, of those two broad categories.

In contrast, § 13-224 specifically applies to complaints for the recovery of wrongful pass-through tax charges collected by a public utility pursuant to the Act. As explained supra, the Complaint is the very prototype of an allegation that ComEd illegally imposed tax charges pursuant to the Act. Inland claims that ComEd collected municipal taxes from Inland payable to the Village, in violation of the Village ordinance pertaining to municipal utility taxes (which only permits collection of such taxes from customers within Village corporate limits), and ComEd's own Rider 23. Accordingly, § 13-224 more specifically relates to the instant case and is therefore the applicable statute of limitation.

C. Equity Supports Application Of 735 ILCS 5/13-224 To This Action

Equitable concerns compel the application of § 13-224 to this action. ComEd is merely a conduit for the collection of the municipal taxes at issue here. ComEd collects municipal taxes from its customers, and then pays the taxes over to municipalities such as Franklin Park. ComEd does not keep the municipal taxes for its own benefit. Inland waited from at least October of 1997, when it claims that the mistaken collection of municipal taxes was corrected, until May 26, 2000 to file a formal complaint against ComEd.

However, the same Village ordinance which authorizes the tax as to customers within Franklin Park corporate limits prohibits ComEd from recovering municipal taxes back from the Village more than three years after the due date of such taxes. See Franklin Park, Ill., Ordinance No. 8990 G 12 (1989) ("[N]o action to recover any

amount of tax due under the provisions of this Ordinance shall be commenced more than three (3) years after the due date of such amount.") (attached as Ex. D). Thus, the Village ordinance and § 13-224 are roughly symmetrical, each containing a three-year statute of limitation. If Inland is permitted to recover municipal taxes allegedly illegally collected prior to September 15, 1996, ComEd will be unfairly penalized for Inland's delay in raising this claim because ComEd will be barred from, in turn, recovering such taxes from the Village. Thus, Inland's Complaint should be dismissed to the extent that it seeks to recover municipal taxes purportedly collected prior to September 15, 1996.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondent Commonwealth Edison Company requests that the Illinois Commerce Commission grant its Motion to Dismiss the Amended Complaint and enter an order dismissing the Amended Complaint with prejudice.

Dated: July 31, 2000

Respectfully submitted,

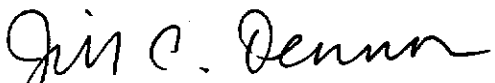
COMMONWEALTH EDISON COMPANY

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CERTIFICATE OF SERVICE

I, Jill C. Dennor, an attorney, hereby certify that on July 31, 2000, I caused a copy of the attached Motion to Dismiss Inland Paperboard and Packaging, Inc.'s Amended Complaint to be served by messenger on Hearing Examiner Philip A. Casey and on Inland Paperboard and Packaging, Inc. at these parties' respective addresses on the attached Service List.



Jill C. Dennor